United Nations A/CN.9/WG.V/WP.156

General Assembly

Distr.: Limited
19 February 2018

Original: English

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Fifty-third session
New York, 7–11 May, 2018

Recognition and enforcement of insolvency-related judgments: draft model law

Note by the Secretariat

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V.18-00950 (E)

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I. Introduction

1. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[1] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903) and fifty-second (December 2017) (A/CN.9/931) sessions.

2. Following the fifty-second session, the draft model law was circulated to governments for comment. While those comments will be provided to the fifty-first session of the Commission (25 June-13 July 2018), any issues requiring further consideration of the draft text by the Working Group will be raised orally at the fifty-third session.

3. The notes below outline a few drafting suggestions by the Secretariat. It should be noted that the articles will not be renumbered until after finalisation and adoption by the Commission.

II. Drafting proposals

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court [or authority] before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

Note on article 4

1. Since article 4 addresses both courts and other authorities competent to recognize and enforce a judgment, the words "or authority" might be added as indicated and also to the end of draft article 12 (d) after the word "court".

2. Alternatively, since nearly all articles in the draft model law refer to "the court" (e.g. 6, 9, 10, 11, 12, 13, 14) it may be appropriate to add the words "or authority" throughout the text or to add to the text a definition of "court" that reflects the wording in the definition of "judgment", along the lines of "a judicial or administrative authority, provided the administrative authority can issue decisions which have the same effect as a decision of a judicial authority". An alternative approach may be to include an explanation of the term "court" in the guide to enactment (e.g. in section III.C Use of terminology).

Article 12. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 13, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 [, paragraph 1] with respect to effectiveness and enforceability are met;

(b) ...;

(c) ...; and

(d) ... .

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Note on article 12

3. Since the revised version of article 9 contains only one paragraph, the words "paragraph 1" in subparagraph (a) of article 12 should be deleted.

Article 14. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] *or* [would have had if it had been issued by a court of this State].*

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

[* *The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 14.*]

Note on article 14

4. To clarify that the two sets of text included in square brackets in article 14 are intended to be alternatives for States to choose between, the word "*or*" might be added, together with the footnote (indicated with an *) as suggested. The alternative nature of the drafting is explained in the draft guide to enactment.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of [the] [that] Model Law. States may therefore wish to consider enacting the following provision.

Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

....

Note on article X

5. In the words in italics preceding article X, the words "the Model Law" at the end of the first sentence might be replaced with "that Model Law" to clarify that the reference is to MLCBI.